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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 833

UNITED STATES OF AMERICA
ex rel. EUGENE HAIRSTON,

Petitioner,

vs.

FRANK J. PATE, Warden, Illinois State Penitentiary; and HERBERT D. BROWN, Director of Public Safety,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on August 12, 1969, dismissing petitioner's appeal from an order dismissing a petition for a writ of habeas corpus.

OPINION BELOW.

The memorandum of judgment order of the United States Court of Appeals is unreported. The memorandum of judgment order of the District Court for the Northern District of Illinois, dismissing the petition for writ of habeas corpus, was entered on April 25, 1969, and is unreported. A certificate of probable cause was refused and the appeal dismissed on August 12, 1969. The orders of the Court of Appeals are set out in full in Appendix A to this petition.

THE RECORD.

A certified copy of the record below has been timely filed with this Court.

JURISDICTION.

This petition is presented for review of the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED.

Illinois law provides for bail on appeal in criminal cases. The question presented here is whether Illinois may, consistent with the bail provisions of the Eighth Amendment, and the Due Process and Equal Protection clauses of the Fourteenth Amendment, administer that provision so as to grant bail on appeal to some while denying such relief to others, without standards, hearing, reasons, or distinctions between cases in which bail on appeal is granted or denied.

1. Once a state grants a right to bail on appeal, are there standards that must be met in granting or denying requests for such bail, subject to federal standards upon federal habeas corpus, under the Eighth and Fourteenth Amendments so as to avoid making bail on appeal a matter of grace?

2. Is it a violation of the petitioner's constitutional rights to due process to deny him bail on appeal where the record shows that he was allowed bail from conviction to sentence, but where bail on appeal was denied upon sentence, where there was no change in circumstances?

3. Is it a violation of the petitioner's constitutional rights to equal protection to deny him bail on appeal where the trial and reviewing courts continue to grant bail on appeal to persons with serious records of criminal convictions on appeals of charges greater than the charge from which petitioner appeals?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Ill. Rev. Stat. 1967, Ch. 38, Sec. 107(d).

Ill. Rev. Stat. 1967, Ch. 110A, Sec. 609(d).

United States Constitution, Eighth Amendment.

United States Constitution, Fourteenth Amendment.

STATEMENT OF THE CASE.

On September 12, 1967, one Dennis Jackson shot three men and one later died. The State, on an accountability theory, charged petitioner for Jackson's actions, and alternatively, charged petitioner with soliciting Jackson to commit these crimes.

Petitioner was convicted of the three counts of solicitation charges and acquitted of the other substantive charges in a jury trial. When the jury returned its verdict the trial court admitted petitioner to bail ($15,000). After a hearing in mitigation or aggravation of punishment where character evidence in petitioner's favor by a neighborhood businessman and by a Catholic priest was uncontroverted, the trial court entered a sentence of 5 to 15 years, where the maximum penalty was 20 years. Without any change in circumstances, and without a hearing, the trial court denied bail on appeal.

Petitioner had no prior felony convictions, and three minor misdemeanor convictions, where he received minimal penalties. While on bail he had appeared in court whenever his case was called and during this period there was no effort by the prosecution to revoke bail. Plaintiff has appealed. His abstract and brief on the merits will be filed as exhibits to this petition, and the hearing in mitigation appears in the abstract of petitioner's trial record, pp. 179 to 212. The entire record on petitioner's bail request reads:

> Mr. Cotsirilos (Defense Counsel): Your Honor, I will advise the court now that we will file a notice of appeal within the statutory time.

The Court: Okay, you may do so.

Mr. Schreier: Your Honor, there is no appeal bond, as I understand it, now?

The Court: The Court is going to deny an appeal bond.

Mr. Cotsirilos: Your Honor, this man has been out for sixty days. You heard what these people said.

The Court: I know that.

Mr. Cotsirilos: We ask that you set an appeal bond. Even if you were to increase it, it would be perfectly agreeable.

The Court: Mr. Cotsirilos, this court is going to deny an appeal bond. You can file your notice and you can go to the Appellate Court and request an appeal bond from them.

Mr. Cotsirilos: Judge, we can't get into the Appellate Court immediately. And there is no reason to take this man into custody. He has appeared every time he was supposed to appear before your Honor.

The Court: Gentlemen, this is the order of the court. The court stands adjourned.

There were no findings or reasons stated.(*)

(*) There is a dispute between the circuits as to whether or not reasons must be specified to support or deny bail. The record was deemed inadequate in *United States* v. *Harrison*, 405 F. 2d 355 (D.C. Cir. Oct. 23, 1968); *United States* v. *Jackson*, (C.A.D.C. May 16, 1969, 3 Cr.L. 2185, May 28, 1969). The record was considered adequate in *United States* v. *Porter* (U.S.D.C. March 24, 1969, 5 Cr.L. 2062, April 23, 1969); *United States* v. *Blyther*, 295 F. Supp. 1088 (D.D.C. Jan. 6, 1969). In the present case the record is clear: no basis for denying bail was presented by the prosecution and there is no basis to refuse petitioner bail.

Petitioner has appealed his conviction to the Illinois Supreme Court. The state never contended that the issues raised on appeal were insubstantial or that the appeal was frivolous.

As appears in the brief, petitioner shows, *inter alia,* that he is entitled to discharge, as he was denied the constitutional right to a speedy trial, that the acquittals where he was tried on an accountability theory on the substantive charges were acquittals of the inchoate charge of solicitation of the substantive offenses, either as a plea in bar or under the constitutional prohibition against double jeopardy, and that the state failed to meet its proof beyond a reasonable doubt. Petitioner shows, alternatively, that he is entitled to a new trial because he was photographed under floodlights by television cameras in front of the jury, because of prejudicial newspaper publicity, conduct of the prosecution and rulings of the court, and closing argument. The appeal was filed on direct appeal to the Illinois Supreme Court as constitutional questions of substance are at issue, Illinois Supreme Court Rule 603, Ill. Rev. Stat. 1967, Ch. 110A, Sec. 603.

Petitioner exhausted state remedies.(*)

A writ of habeas corpus was denied by the District Court for the Northern District of Illinois, Eastern Division, on April 25, 1969 (Memorandum Order set out in

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(*) He sought bond on appeal from the Illinois Supreme Court, on three separate occasions, September 3, 1968, October 1, 1968, by a single judge, and on October 3, 1968, by the full Illinois Supreme Court, all without opinion. This Court denied a motion for emergency relief on November 18, 1968, by one Justice, and on December 9, 1968 by the Court.

Appendix "A") and a "motion for emergency relief" was denied by the Court of Appeals for the Seventh Circuit on May 5, 1969, rehearing denied on July 22, 1969, and a certificate of probable cause was denied on August 12, 1969 (Memorandum Order set out in Appendix "A").

The brief and abstract of petitioner's appeal on the merits was not available when these rulings were made. The basis in these proceedings for the state's objection to bail is solely on the ground of danger to the community. The state has never claimed that the appeal was frivolous or the issues insubstantial. The state has never offered testimony or exhibits to make any showing of danger.

REASONS FOR GRANTING THE WRIT.

IMPORTANT CONSTITUTIONAL QUESTIONS NOT PREVIOUSLY DECIDED BY THE FULL COURT.

Where a state provides for bail on appeal can such bail be denied on less than federal standards required under the Eighth Amendment, and under the Due Process and Equal Protection clauses of the Fourteenth Amendment?

In *Rehman* v. *California,* 13 L. Ed. 2d 17, 85 S. Ct. 8 (1964, Black, J.) this Court, in a state court appeal, decided that (p. 18n.):

> ". . . bail pending appeal should be denied only in cases in which, from substantial evidence, it seems clear that the right to bail on appeal may be abused or the community may be threatened by the applicant's release. *Leigh* v. *United States,* 8 L. Ed. 2d 269, 271, 82 S. Ct. 994, 996."

The Court made it clear that bail on appeal was to be granted unless on such "substantial evidence" (p. 18) "the applicant fell within the small and exceptional category of people who are not entitled to bail on appeal."(*)

In *Sellers* v. *United States,* 89 S. Ct. 36 (1968, Black, J.) the Court decided, on the same standards—substan-

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(*) Only where an appeal is frivolous does this rule not apply, *Rehman* (p. 18n.). In the present case petitioner raises substantial questions on the merits of his appeal (copies of the briefs and abstracts will be filed as exhibits to this petition). The state has never taken the position that this appeal is frivolous or that petitioner's issues are frivolous, and the exception does not apply here. See *Aronson* v. *May,* 13 L. Ed. 2d 6, 8, 85 S. Ct. 3 (1964, Douglas, J.) deciding that if substantial issues are raised, that is grounds for bail on appeal.

tial evidence of flight or danger to the community—that bail on appeal was to be determined under the Eighth Amendment. And the Eighth Amendment applies to the states, *Pilkinton* v. *Cir. Ct. of Howell County, Mo.*, 324 F. 2d 45, 46 (1963), *Robinson* v. *California,* 370 U.S. 660 (1962).

Bail, under federal standards is not a matter of grace, *Cohen* v. *United States,* 7 L. Ed. 2d 518, 520, 82 S. Ct. 526 (1962),(*) and denial of bail by arbitrariness or as a result of discrimination is a violation of due process or equal protection of the laws, *Mastrian* v. *Hedman,* 326 F. 2d 708 (8th Cir. 1964), cert. den. 84 S. Ct. 1128 (at p. 711):

> "[amounting] in its effect to legal arbitrariness in the administration of the bail right provided so as to constitute a violation of due process, or to discriminatoriness in the application of the right as against petitioner, so as to constitute a violation of equal protection."

Illinois provides for bail on appeal but fails to comply with minimal federal standards and violates due process of law.

Illinois provides for bail on appeal, Ill. Rev. Stat., 1967, Ch. 38, Sec. 107(d):

> "After conviction, the court may order that the original bail stand as bail pending appeal, or deny, increase or reduce bail."

(*) "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor."

The petitioner in the *Cohen* case was granted bail pending determination of a certiorari petition.

And Illinois Supreme Court Rule 609(d), Ill. Rev. Stat., 1967, Ch. 110A, Sec. 609(d), provides that the reviewing court may set bond on appeal. Illinois, however, treats bail on appeal as a matter of grace, and does not comply with these standards.

The federal standards, as determined in *Rehman, supra,* require "substantial evidence" of flight or danger to the community, citing *Leigh, supra,* (Warren, J.). Evidence is the burden of the prosecution, *Ward* v. *United States,* 1 L. Ed. 2d 25, 76 S. Ct. 1063 (1956, Frankfurter, J.) where the trial record alone is insufficient to meet that burden, *Pannell* v. *United States,* 320 F. 2d 698, 700 (1963). Mere representations by the prosecution are not enough. Yet in the present case the record shows that the state did not make any record to support denial of bail on appeal.(*) Petitioner had been released on bail for some 60 days between the verdict and sentence. No request for revocation of bail was necessary by the state during that period. Yet the only opposition to bail on appeal is an unsupported claim of danger.(**)

(*) See *Carroll* v. *President and Commissioners of Princess Anne,* 21 L. Ed. 2d 325, 332, n. 10 (1968):

> ". . . there is danger in relying exclusively on the version of events and dangers presented by prosecuting officials because of their special interest."

Petitioner had three minor misdemeanor convictions and no felony convictions. Compare with what the Court said in *Cohen, supra.*

(**) Contrast with what the Court said in *Princess Anne, supra.*

Illinois discriminates in granting bail on appeal, in violation of the equal protection clause.

The equal protection clause of the Fourteenth Amendment applies to questions of bail, *Mastrian, supra.* Yet Illinois provides for and grants bail on appeal, but does so in a discriminatory and arbitrary manner, in violation of the Fourteenth Amendment.

Cases where bail has been denied or granted in Illinois show a capricious, non-pattern result. The Illinois Supreme Court has granted bail on appeal to persons convicted of murder (*People* v. *Nuccio,* No. 41975, 1968) (a shooting in the back); (*People* v. *Branion,* No. 41622, 1968) (eleven shots fired into wife); kidnapping (*People* v. *Bravos* No. 42616, 1969) (four crime syndicate members convicted in 1967 in a "juice loan" case—involving kidnapping, torture and murder threats). In the same court, Circuit Court of Cook County, Criminal Division, where petitioner was denied bail on appeal, bail on appeal was granted on convictions of manslaughter (*People* v. *Hough, Larson* v. *Mazzone & Kracht,* No. 68-1855, 1968) (defendants beat a youth to death with a baseball bat); conspiracy to commit murder (*People* v. *Saiken,* No. 68-840, 1969) (acquittal of murder).

Yet petitioner was acquitted of murder, where at best he was tried on an accountability theory, and then released on bail until sentencing, and then sentenced to less than the maximum; but denied bail on appeal.

It is apparent that Illinois deals with bail on appeal as a matter of grace, and in petitioner's case did so in violation of his constitutional rights.

CONCLUSION.

The Court should grant review to consider and apply Eighth Amendment bail rights and Fourteenth Amendment Due Process and Equal Protection rights to bail in state court appeals.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 12, 1969

Before
Hon. Latham Castle, Chief Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge

United States of America, ex rel Eugene Hairston,
Petitioner

No. 17585 vs.

Frank J. Pate, Warden, Illinois State Penitentiary; and Ross V. Randolph, Director of Public Safety.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

This matter comes before the court on motion of Eugene Hairston, petitioner-appellant, for a certificate of probable cause and his motion for extension of time for filing his brief.

Eugene Hairston is in custody, pursuant to the judgment of an Illinois court, having been convicted of solicitation of murder. He has taken an appeal to the Supreme Court of Illinois and his appeal is pending. The state trial and supreme courts have denied bail pending appeal.

He petitioned the district court for a writ of habeas corpus and release on bond while his appeal is pending. He alleged the denial of bail was summary, arbitrary, and discriminatory.

The district court denied the petition and denied a certificate of probable cause for the reasons stated in a memorandum opinion. He concluded that there had been no abuse of discretion by the state court judge.

The existence of any federal protection of a right to bail after a state court conviction and while a state court appeal is pending is doubtful. Intentional, purposeful, invidious discrimination would have to be clearly shown.

In the instant case, the state judge was familiar with the circumstances of the crime as shown in the evidence. The state's evidence apparently showed that Hairston had urged three young teenagers to violent assault, resulting in death of one man and wounding of others. Hairston's sentence was not less than five nor more than fifteen years. His record included convictions of aggravated assault (1961), of battery (1965), of resisting arrest and disorderly conduct (March 1967) and resisting arrest (May, 1967). Having presided at the trial, the judge heard an evaluation of the possibility of reversal on appeal, although the state has not argued that the appeal is frivolous.

Although it is true that Hairston appeared at all times prior to sentence, when free on $15,000 bond, it can not be said that the state court judge abused his discretion nor demonstrated intentional, purposeful, invidious discrimination.

Each of the judges above named refuses to issue a certificate of probable cause.

Accordingly,

It Is Ordered, that the appeal is dismissed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, July 22, 1969

Before
Hon. Latham Castle, Chief Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

United States of America
ex rel. Eugene Hairston,
Petitioner-Appellant,

No. 17585 vs.

Frank J. Pate, Warden, Illinois State Penitentiary; and Ross V. Randolph, Director of Public Safety,
Respondents-Appellees.

ORDER

This cause came on to be heard upon the Motion for Rehearing En Banc filed May 12, 1969; and no active judge of this court or judge in regular service having requested a vote on the suggestion of rehearing en banc within ten days of the distribution of the petition and the suggestion, as required by this court's internal rule implementing Rule 35(b) of the New Federal Rules of Appellate Procedure;

It Is Ordered that the Motion for Rehearing En Banc be and it is hereby denied.

It Is Further Ordered that the Request for Oral Argument and Leave to File an Additional Brief filed July 18, 1969, be and it is hereby denied.